

Admitting Expert Child Custody Evaluations Under Newly Amended MRE 703 & 1101

Judge William J. Giovan
Michigan Judicial Institute
Michigan Hall of Justice
Lansing, Michigan
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I. What's the problem?

- A. Amended MRE 703 - effective 9-1-03.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

- B. A Brief History of Rule 703.

1. Original FRE 703.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

2. Original MRE 703.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

II. The remedy - MRE 1101(b)(9) - effective 9-1-03.

- A. The Amended Rule:

Rule 1101 Applicability

- (a) [Unchanged.]

- (b) *Rules inapplicable.* The rules other than those with respect to privileges do not apply in the following situations and proceedings:

- (1) - (8) [Unchanged.]

- (9) *Domestic Relations Matters.* The court's consideration of a report or recommendation submitted by the friend of the court pursuant to MCL 552.505(1)(g) or (h).

- (10) *Mental Health Hearings.* In hearings under Chapters 4, 4A, 5, and 6 of the Mental Health Code, MCL 330.1400 *et seq.*, the court may consider hearsay data that are part of the basis for the opinion presented by a testifying mental health expert.

- _____B. Friend of the Court Statute - MCL 552.505(1)

Sec. 5.(1) Each office of the friend of the court has the following duties:

* * *

- (g) To investigate all relevant facts, and to make a written report and recommendation to the parties and to the court regarding child

custody or parenting time, or both, if there is a dispute as to child custody or parenting time, or both, and domestic relations mediation is refused by either party or is unsuccessful, or if ordered to do so by the court. The investigation may include reports and evaluations by outside persons or agencies if requested by the parties or the court, and shall include documentation of alleged facts, if practicable. If requested by a party, an investigation shall include a meeting with the party. A written report and recommendation regarding child custody or parenting time, or both, shall be based upon the factors enumerated in the child custody act of 1970, 1970 PA 91, MCL 722.21 to 722.31. (Emphasis supplied.)

C. The mechanics of securing an expert custody report.

1. Stipulation of the parties.
2. Motion of a party.
3. *Sua Sponte* order of the court.
4. Sample communications:
 - (a) Specimen court order. (Attachment 1)
 - (b) Specimen Friend of Court letter. (Attachment 2)

III. The benefits of the amendments.

A. They cure a long-standing judicial disregard of the Friend of the Court statute:

1. *The Friend of the Court Report is not admissible in evidence:*

Sweet v Sweet, 329 Mich 251 (1950).

Brugel v Hildebrant, 332 Mich 475 (1952).

Ewald v Ewald, 14 Mich App 665 (1968)

Dempsey v Dempsey, 96 Mich App 276 (1980).

2. *Error for trial judge not to consider the Friend of the Court Report:*
Hoffman v Hoffman, 119 Mich App 79 (1982).

3. The explanation of the apparent incongruity:

Jacobs v Jacobs, 118 Mich App 16, 23 (1982):

“At first glance, it seems incongruous to say that while the report is inadmissible it may nevertheless be ‘considered’ by the trial court.² We find, however, that it is not illogical to permit the trial court to use the report to assist it in its understanding of the critical issues to be resolved and, at the same time, to insist that resolution of those issues be based entirely upon competent evidence brought forth by the parties at the hearing.

²We note that the Supreme Court has proposed amending GCR 1963, 727 to provide that “[t]he report of the Friend of the Court shall be admissible as evidence.” 413 Mich 1101 (1982).”

B. The amendments eliminate adversary child custody reports and testimony.

1. Adversary child custody reports are expensive and time consuming.

“Prudent and responsible Family Law practitioners have an ethical and fiduciary responsibility to explore the possibility of a reasonable compromise with the opposing party, prior to triggering the thousands of dollars in expense associated with retention of an expert. The involvement of an expert *ratchets* the litigation to a new level; this may harden the positions of the parties, and make it more difficult to conclude the case.... Moreover, until and unless the Attorney is convinced that reasonable and rational expert testimony will advance the Court’s understanding of the ultimate issues, an expert should not be retained.” (James J. Harrington, III, “Use of Experts in Custodial Clashes: A Practical Primer.” Michigan Family Law Journal, Special Edition, 2000, pp. 23-24. Emphasis by the author.)

2. Adversary expert child custody reports have questionable value:

“We do know from scientific research relating to clinical decision making that clinical predictions, which are the essential (though sometimes unexpressed) underpinnings of custody evaluations, are, in a number of forensic areas, quite unreliable and often have only a modicum of

predictive validity. In some spheres of clinical prediction the validity/reliability measures associated with those predictions are so low as to render clinical judgments a usefulness little better (and sometimes worse), than chance.

* * *

What then is the clinician doing here and why do custody evaluations still persist? Well, even if the clinician is not doing what they, or the court, thinks they are doing, they are doing something. We should be honest about what that is. For one, clinical custody evaluations generally put an end to disputation. When the clinical evaluation is complete, the parties are emotionally and financially spent, this puts an end to disputation. When the expert submits a report he/she sits as *de facto* judge, presaging what will happen in the courtroom, this puts an end to disputation. When the evaluation is complete, the parties may feel ‘heard’ and believe that the child’s fate has been determined by one who enjoys some special know-ledge of human nature and its determinants, this belief puts an end to disputation.” (Melvin Guyer, Ph.D., J.D., “The Expert in Custody Evaluations (Out of the Frye Pan and Into the Tire),” Michigan Family Law Journal, Special Edition, 2000, pp. 49-51.)

3. Adversary expert child custody reports were used because the rules permitted them.

“When you have money to work with in a divorce case, hiring the best possible valuation expert is recommended. Doing so reduces your malpractice liability and helps assure a fair and equitable division.

* * *

When your client can afford an expert, hire one. Your malpractice carrier will thank you. When your client can’t afford an expert (and you have it in writing that you have recommended hiring an expert, but the client declined), use of these techniques may be the best you can do to effectively represent your client.” (Scott Bassett, Esq., “Values on the Cheap: Alternatives to Hiring an Expert,” Michigan Family Law Journal, Special Edition, 2000, p. 8.)

- C. The amendments eliminating most of the need for in-court testimony.
 1. The procedure is not governed by MRE 706, “Court-Appointed Experts.”
 2. The child custody expert needn’t testify in order that the report be used by the court.

3. What occurs if the expert testifies by subpoena?
4. What is the role of an expert called by the opposing party?

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF _____

Plaintiff,

No. _____

v

Hon. _____

Defendant.

_____ /

**Order Requesting Report and
Recommendation Regarding Custody**

At a session of said Court held on

PRESENT: HON. _____

The court (on its own motion)(on motion of the *plaintiff/defendant*)(pursuant to the stipulation of the parties) directs the Friend of the Court to secure a report and recommendation from

_____ of _____ regarding the award of custody of _____
(Name of expert) (Name of agency, if applicable)

_____, the minor child(ren) of the parties. Said report and recommendation shall be attached to the statutory report of the Friend of the Court required by MCL 552.505(1)(g).

The parties shall cooperate with the reasonable requests of the above-named expert in connection with the preparation of the report and recommendation.

The fee for the preparation of the report and recommendation, which shall be subject to the approval of the court, shall be paid by _____.

Circuit Judge

ATTACHMENT 1

Wayne County Friend of the Court
645 Griswold
Detroit, MI 48226

(Date)

To:

Re: Case # _____

Dear:

Pursuant to the enclosed order of the Honorable _____, you are requested to prepare a report and recommendation regarding the (custody)(parenting time)(support) of _____, the minor child(ren) of the parties in the above action.

Upon completion of the report, please send copies of the same to this office, the above-named judge, and to counsel for the parties, listed below. You should contact them to arrange interviews of the parties and the child(ren).

Unless otherwise specified below, the fee for your services will be shared equally by the named attorneys.

Sincerely,

Wayne County Friend of the Court

By _____

cc: Court File
Counsel

Attorney for plaintiff:

Attorney for defendant:

ATTACHMENT 2